Supreme Court, U.S.
FILED

No. 011539 APR 16 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

—v.—

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Petitioner-plaintiff owned an assembly of properties on Manhattan's eastside which he had merged into a single zoning lot. He planned to build an apartment house. Defendant City of New York then issued an Order which barred plaintiff from obtaining a construction permit he required to make any use of his vacant property. Plaintiff did not accept an offer by The City to split the property into segments to regain some use of it by rehabilitating existing buildings. Instead, he sold the property before obtaining from The City a final determination of its permitted use.

QUESTIONS PRESENTED

Whether a takings claim forever remains unripe when a landowner sells the property interest before obtaining a final and authoritative determination of land use.

Whether an owner is required to split a property into segments to ripen a regulatory takings claim.

Whether access to the federal courts is forever barred on *res judicata* or on ripeness grounds after denial of justice in the state court where the merits of a regulatory takings claim have not been litigated.

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PETITION FOR WRIT OF CERTIORARI

Peter Sudarsky respectfully petitions for a writ of *certiorari* to review the judgment of The United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of The United States Court of Appeals for the Second Circuit, unpublished, appears as Appendix A to the petition (dated Nov. 14, 2001, index no. 00-9470).

The decision of the United States District Court Southern District of New York appears as Appendix B (dated Oct. 20, 2000) (99 Civ. 10921).

The March 12, 2002, DENIAL of a Petition for Rehearing by The United States Court of Appeals for the Second Circuit appears as Appendix C. (index no. 00 9470).

A decision of the New York Supreme Court Appellate Division First Department (220A.D. 2d 353, 9/31/95) appears as Appendix D.

A second decision of the New York Supreme Court Appellate Division First Department (cite as 247 A.D.2d 206, 668 N.Y.S. 2d 350) (entered Feb. 3, 1998) appears as Appendix E.

Decisions of the New York Supreme Court (trial court) dated March 22, 1994, and February 19, 1997, which were the subject of the appeals to the Appellate Division in App. D and App. E appear here as App. F.

JURISDICTION

The unpublished judgment of the United States Court of Appeals was entered November 14, 2001 (Appendix A to this petition). Petition for Rehearing was denied March 12, 2002 (Appendix C). This Court has jurisdiction under 28 U.S.C. para 1257(a) and Sect. 1983 Statutes.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

Defendant City of New York barred issuance of a permit required by Plaintiff to make any use of his vacant midtown property in Manhattan for an unreasonable period of time while costs of ownership continued to accrue. Plaintiff's regulatory takings claim has been subjected to a series of judicial evasions of responsibility which resulted in summary judgments in favor of the municipal defendants granted without trial or judicial examination of the issues. Whether the regulation imposed by The City did take all use of the property and did so with legitimate public purpose are issues which have not ever been adjudicated in 12 years of motion practice.

Now, once again, as a result of the Panel Summary Order of Nov. 14, 2001, by The United States Court of Appeals for The Second Circuit (App. A), Plaintiff's takings claims for the inverse condemnation of property in which he invested the earnings of an adult lifetime have been dismissed without trial. The Court below affirmed a grant of summary judgment by The Federal District Court on *res judicata* grounds although trial of the merits has not ever been held. The Second Circuit based its decision on its finding that because Petitioner did not obtain "a final and authoritative determination" of what use could be made of the property, he cannot now bring a regulatory takings claim for either the permanent loss of value or for the costs which accrued while defendants were taking all use, nor can he ever do so because he sold the property without obtaining that determination.

The unpublished decision of United States Court of Appeals for the Second Circuit of New York (App. A) bars landowners caught in a web of dilatory land-use regulation from pursuing regulatory takings claims if they choose to sell instead of submitting to continued rounds of futile applications.

The futility of actions available to Plaintiff to obtain that final determination was not acknowledged in the unpublished decision of The Second Circuit. Nor did that Court acknowledge or rule upon Plaintiff's temporary takings claim for costs in excess of $3,000,000 which accrued while all use was taken.

After 12 years, plaintiff continues to seek an ever more elusive trial of the merits.

A. Factual Background

Plaintiff, an ex journalist turned real estate developer, owned eight contiguous brownstones in midtown Manhattan in 1985 on E. 52nd and E. 53rd Streets between

Third and Second avenues. The parcel consisted of nine 20' by 100' zoning lots which had been consolidated into a single lot. This was the only assembled site ready for construction in midtown at the time and attracted the attention of neighbors and preservationists. I was stopped cold by actions of the defendant City of New York from making any use of my vacant property.

The City and The Metropolitan Transit Authority imposed a ban in 1987 against issuance of any permit on the property. Defendants issued their permit ban to facilitate obtaining an easement under the E. 53rd Street portion of the property to provide for construction of a tunnel connecting subway stations on Second and Third avenues in the event that the Second Avenue Subway Line is built in the future.

Defendants then waived access for the tunnel into both subway stations the tunnel was intended to connect, raising a question of fact as to whether the permit ban would have met the "rough proportionality" requirement in This Court's *Dolan* ruling. The City had not designed a tunnel and had failed to determine the dimensions of an easement which it was willing to accept.

Plaintiff, therefore, was unable to give the City the easement for a period of two years in which The City continued its Order in effect barring submission or consideration of any permit application. As a result, Plaintiff was unable to obtain a "final determination" of the permitted use of the property.

Plaintiff had relocated all the tenants, severed utilities from the street which could not be reconnected without permits barred by defendants, obtained demolition permits, secured financing and applied for a construction permit by the time Defendants issued their order barring a permit. I could not rent or use the property, build on it,

or sell it. My brokers were unable to obtain a single offer to buy the property or any part of it while the permit ban remained in effect. Taxes accrued at $28,000 per month and interest payments at $150,000 per month. Ownership costs while all use was denied exceeded $3,000,000. The addition of these ownership costs to the purchase price made its economic development unviable.

Defendants continued in effect their Order banning issuance of any permit required to make use of the vacant property for a year after legislating a rezoning of what came to be called "The Sudarsky Property." Plaintiff could not build even the smaller building contemplated by the downzoning or make any use of the property for almost two years while its value remained at zero. Brokers were unable to obtain a single offer to purchase any part of it while the permit ban continued. Services could not be reconnected without permits. The downzoning legislated by The City of New York, in itself, also took all viable economic use of the property, reducing available FAR by 55 percent. Plaintiff's property was the only site in the downzoned area ready for development. The futility of a BSA proceeding is undisputed.

For the period of time Plaintiff owned the entire property, there was no use which could be made of it. Its value had been reduced to zero.

Defendant City of New York offered plaintiff only one alternative for obtaining a final determination of use of the property. If plaintiff split the property into segments, The City would permit owners of each segment to obtain permits.

Subdivision would not restore viable economic use but it could restore some value to the property and allow it to be sold. After years of trying to provide an easement

and to negotiate a permitted use for the property, I accepted the City's offer to subdivide the zoning lot and sold the parts.

I was able to sell only after splitting the properties as demanded by defendants, who then withdrew their permit ban and easement demand by assuring interested buyers that barriers to issuance of a permit would not be enforced upon subdivision of the properties and sale of the parts.

I sold the property in pieces for approximately $11,450,000, about $1,000,000 less than I paid for it three years earlier. By that time I had invested an additional $10,000,000 for tenant relocation and expenses of ownership.

Whether an owner is required to split a single property into parts in a manner which may destroy its value as a whole but which restores some value above zero to the parts is an issue.

B. Judicial Proceedings

Unwisely in retrospect, I commenced suit in federal court. In *Peter Sudarsky et al v. City et al v. City of New York*, (RJW) 779 F.Supp. 287-293 (1991), the Hon. Robert J. Ward dismissed plaintiff's due process and equal protection claims, but as he "made clear," he did not rule on the merits of my regulatory takings claim. He found that claim was unripe because I had not exhausted state court remedies.

For years defendants have continued to confuse and complicate the issues by representing that my takings claims were decided by Judge Ward in 1991 although The Court's decision at that time held, specifically, that the issue of "too far" essential to a finding on the merits had not been adjudicated. The 1991 decision did not

decide the merits and made no reference to the futility of submitting additional, more modest proposals after the Order of Defendants barred issuance of any permit on my property.

I have not included the District Court's 1991 decision in the Appendix because it does not bear on those significant issues of ripeness and preclusion which are the subject of This Petition.

Subsequent appeals of the 1991 Decision of The District Court and motions based on new evidence were rejected by The District Court and The Second Circuit. A Petition for Certiorari was summarily rejected by This Court.

I brought my takings claim to State Court, which ultimately dismissed without trial of the merits on grounds that I had failed to meet the procedural requirement for Notice of Claim in New York's Municipal Law. Four contradictory state court decisions are listed below:

1) The Supreme Court (trial court) in New York summarily dismissed my regulatory takings claim without trial on res judicata grounds (index 29446-92 decided 3/22/94) holding I had picked my forum and lost. (App. F).

2) The New York State Appellate Division First Department reversed and remanded, holding that the prior federal court rulings were "not final" on the merits and not grounds for a *res judicata* finding (220A.D. 2d 353, 9/31/95) (App. D herein). This finding precludes a dismissal on *res judicata* grounds.

3) The New York Supreme Court (trial court) once more without trial then dismissed on an erroneous finding of lack of timeliness (29446-92 dated 2/19/97). (App. F).

4) The Appellate Division in its second decision in This Case found the dismissal on timeliness grounds was in error but then dismissed on grounds of Plaintiff's failure to comply with the notice requirements of New York's Municipal Law Sect. 50-e. (cite as 247 A.D.2d 206, 668 N.Y.S. 2d 350) (Feb. 3, 1998) (App. E). The dismissal on notice-of-claim grounds was based in part on the A.D's unlitigated assumption in its dictum that my case "lacks substantive merit."

The New York Court of Appeals in summary decisions refused to review the Notice of Claim bar to my takings claim.

The application of a Notice of Claim requirement to dismiss a Fifth Amendment takings claim, reached in part on the basis of an unlitigated assumption on the merits, validates This Court's decision in *Felder v. Casey* 487 U.S.131 (1988), holding that constitutional claims are too important to be disposed of on whimsical grounds where discretion might dictate a finding.

THE RETURN TO FEDERAL COURT

Plaintiff brought anew his takings claim in Federal Court where a requirement for Notice of Claim may not bar suit. Plaintiff believed the case now to be ripe. Plaintiff's Summons and Complaint to the Federal District Court for the Southern District of New York was dated Oct. 29, 1999.

No trial on the merits had ever been held. Yet The District Court granted Appellee' 12(b)(1) and 12(b)(6) motions to dismiss on *res judicata* grounds in its decision dated Oct. 20, 2000 (99Civ. 10921) App.B.

The United States Court of Appeals for The Second Circuit then affirmed the District Court's *res judicata*

finding in an unpublished decision dated Nov. 14, 2001, index no. 00-9470 App. A.

Although the Second Circuit decision makes reference to an assumption by the New York Appellate Division's second panel of "Lack of substantive merit" (pg. 3) as applied to a requirement for notice, the plain language of The Circuit's decision states that The Court acted on those ripeness findings which are the subject of This Petition.

The Second Circuit held that Plaintiff's case was not ripe and forever remains unripe because plaintiff sold the property before obtaining a "determination of the property's permitted uses."

The decision by Justices Rosemary S. Pooler and Robert A. Katzmann, Circuit Judges, and The Honorable David N. Hurd, District Judge sitting by designation, reads in part:

> "Plaintiff never requested a variance from the new zoning requirements or submitted a proposal other than his original 17-story building. In other words, plaintiff never will be able to show that the city's downzoning went too far in prohibiting development of his property. His claim never will be 'ripe' " (pg 3).

REASONS FOR GRANTING THE WRIT

Reason 1) The concept that a takings claim forever remains unripe when a landowner sells a property before obtaining a final and authoritative determination of land use is inappropriate and contrary to the spirit of the Supreme Court's ripeness jurisprudence for regulatory takings. The decision would allow a municipality to take an end run around jurisprudence of This Court, which

holds that a plaintiff is not required to undertake futile actions to ripen a claim. This Court observed that

> "Government authorities . . . may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision" *Palazzolo v. Rhode Island*, 121 S.Ct. 2448-59 (2001)

November 23, 2001, Plaintiff's Attorney at that time, Professor David J. Bederman, Esq., submitted a Petition for Rehearing. That Petition was rejected summarily in one word decision ("Denied") three months two weeks later on March 12, 2002, the date which starts the clock App. A. (Professor Bederman, who has other cases before This Court and a teaching schedule too, has withdrawn as my attorney. He had been acting *pro bono* and is unavailable to submit This Petition.)

Professor Bederman's Petition for Rehearing to The Court below states in part that

> The real import of this (2nd Circuit) panel's decision seems to be that Sudarsky cannot assert that the City's delay in responding" to his efforts to obtain a final determination constituted a rejection of them, and therefore that he had received a "final and authoritative determination" within the meaning of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). In short, the panel appeared to hold that a land-owner's sale of the property would forever preclude ripeness. This would mean that landowners caught in a web of dilatory land-use regulation and procedures would be barred from pursuing regulatory takings claims if they chose to sell instead of submitting to continued rounds of futile applications.

Reason 2) It remains appropriate for This Court to address the significant ripeness findings upon which The

United States Court of Appeals for the Second Circuit dismissed This Case.

Although Appellees will continue to assert my claims were decided by the 1991 ruling of the Federal District Court in *Sudarsky v. City of New York*, (RJW) 779 F.Supp. 287-293, the doctrine of *res judicata*, itself, bars reference to that decision as a basis for a *res judicata* finding. The New York State Appellate Division First Department held that the findings in the 1991 decision of The Federal District Court were "not final" and do not provide reason for dismissal on *res judicata* grounds (App. D).

Because The Appellate Division ruling precludes a *res judicata* finding based on the 1991 decision of the District Court, I do not include that decision in the Appendix to this Petition. My regulatory takings claim is the only claim now before the federal court. The merits have not been litigated.

The federal courts are not a super board of zoning appeals and have not assumed the authority to reverse the unequivocal ruling of a State Court.

Reason 3) Whether an owner is required to split a property to ripen a takings claim and under what circumstances is a question about which differences are developing in the circuits.

Reason 4) The Court below rejected plaintiff's temporary takings claim for costs incurred while defendants barred all use of the property. That decision is inconsistent with the jurisprudence of This Court and other circuits. To resolve the difference, This Court may decide that an action to recover losses resulting from a temporary regulatory taking is not barred if a plaintiff sells before a final determination of a property's per-

mitted use where efforts to obtain that determination have been made futile by municipal regulation.

Reason 5) Slow financial strangulation of a property's economic viability, however subtle, should not substitute for inverse condemnation as a means of avoiding just compensation as This Court has held.

Reason 6) The right to trial of a takings claim needs affirmation to put teeth into This Court's *Dolan* admonition that property rights receive equal respect as other Constitutional rights. Trial of the merits has not ever been allowed in this case.

Reason 7) "Lack of substantive merit" applied to a requirement for Notice of Claim need not preclude This Court from resolving important questions of ripeness and preclusion raised by This Petition if This Court determines those issues merit its attention.

"Lack of substantive merit," has become a term of art in the judicial system to insulate a court from judicial review. It should not be allowed to do so where the finding is imposed from the bench without argument and without trial of the issues.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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Dated: April 11, 2002

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

00-9470
Filed November 14, 2001

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of November two thousand and one.

Present: ROSEMARY S. POOLER,
ROBERT A. KATZMANN,
Circuit Judges,
DAVID N. HURD,
District Judge.*

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* The Honorable David N. Hurd of the United States District Court for the Northern District of New York, sitting by designation.

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiffs,

PETER SUDARSKY,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK, THE NEW YORK PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSPORTATION AUTHORITY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants-Appellees.

Appearing for Plaintiff-Appellant:

Peter Sudarsky, *pro se*, New York, NY
David J. Bederman, Esq., Atlanta, GA

Appearing for Defendants-Appellees:

Sharyn Rootenberg, Assistant Corporation Counsel (Michael D. Hess, Corporation Counsel, Larry A. Sonnenshein, Louise Moed, Assistant Corporation Counsels, on the brief), New York, NY *for municipal defendants-appellees*.

Ira J. Lipton (Mary Jennings Mahon, Deputy Executive Director and General Counsel, Metropolitan Transportation Authority), New York, NY *for transit defendants-appellees*.

Appeal from judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) dismissing plaintiff's complaint.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Peter Sudarsky appeals from the October 26, 2000, judgment of the United States District Court for the Southern District of New York (Barbara S. Jones, *Judge*) dismissing his complaint principally on grounds of *res judicata*. Sudarsky filed his complaint on October 29, 1999, raising many of the allegations he prosecuted in a federal lawsuit filed in 1989 and a state court lawsuit filed in 1993. All of the litigation stems from Sudarsky's attempt to develop eight lots on East 52nd and East 53rd streets in Manhattan into a single 17-story apartment building. During the planning process, city officials informed Sudarsky that they required a transit easement on his property for an underground pedestrian tunnel for subway passengers. While Sudarsky negotiated the easement, the city's Board of Estimate in October 1987 "downzoned" the area including Sudarsky's property to prohibit construction of buildings taller than eight stories. Sudarsky did not seek a variance or submit another building proposal to the city but instead sold his properties in 1988. Although defendants claim that Sudarsky approximately recovered his purchase price of $12 million, Sudarsky claims to have lost $10 million in development costs.

The key points of Sudarsky's litigation are as follows. Plaintiff filed a lawsuit in federal court, which the district court dismissed in 1991. *Sudarsky v. City of New York*, 779 F. Supp. 287 (S.D.N.Y. 1991). In its 1991 decision, the district court dismissed on the merits

Sudarsky's causes of action under substantive due process, procedural due process and equal protection theories. With respect to plaintiff's allegations that defendants' actions were an unconstitutional taking, the district court first held on the merits that requiring a transit easement was not an impermissible condition on a building permit. *Id.* at 299. The district court also held that plaintiff's regulatory takings claim was not ripe because (1) he failed to obtain a final and authoritative determination from the city regarding what development it would permit on Sudarsky's property; and (2) he failed to use the state court system to seek just compensation for his property. *Id.* at 300-01. Sudarsky then filed a lawsuit in state court pressing, among other things, his regulatory takings claim. The New York courts ultimately dismissed the lawsuit in 1997 because plaintiff failed to file a notice of claim with the city. *Sudarsky v. City of New York*, 668 N.Y.S.2d 350 (1st Dep't 1998). Importantly, the state court refused to give Sudarsky permission to file a late notice of claim because he failed to adequately explain his delay and his lawsuit was "without substantive merit." *Id.* at 351. Sudarsky then brought the present lawsuit in federal court.

On appeal, Sudarsky claims that his second federal complaint is justiciable because neither the federal court nor state court dismissed his regulatory takings claim on the merits. In order to state a claim for regulatory takings, plaintiff must show first that the regulation has taken his property by going "too far" and second that any proffered compensation is not just. *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). Plaintiff under no set of facts can satisfy the first element of his claim. While the 1991 district court decision used the term "unripe" to describe its dismissal of Sudarsky's claim for his failure to obtain a determination

of the property's permitted uses, it now is undisputed that plaintiff never will be able to do so because he sold the property before obtaining the required determination. Plaintiff never requested a variance from the new zoning requirements or submitted a proposal other than his original 17-story apartment building. In other words, plaintiff never will be able to show that the city's downzoning went too far in prohibiting development of his property. His claim never will be "ripe." Contrary to plaintiff's suggestion, this holding is consistent with Supreme Court precedent. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733-39 (1997). Unlike the case before us, the land use regulation in *Suitum* was much more restrictive, permitting no development at all on plaintiff's land, which gave rise to the finality necessary for ripeness. Dismissal under Fed. R. Civ. P. 12(b)(6) was proper.

We have considered all of plaintiff-appellant's remaining arguments and find them to be without merit.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: LUCILLE CARR

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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99 Civ. 10921 (BSJ)

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiff,

—v.—

THE CITY OF NEW YORK, THE NEW YORK PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSPORTATION AUTHORITY, and THE METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

Memorandum Opinion and Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Before the Court is defendants' motion pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss plaintiff's complaint. For the reasons stated below, the motion is *granted*.

By this action, plaintiff *pro se* Peter Sudarsky seeks to recover damages in connection with a failed plan to develop a parcel of real estate he purchased on Man-

hattan's East Side. In particular, he alleges that defendants impeded his plans by requesting an easement for transit purposes, thus delaying the issuance of a building permit, and that, during the course of the delay, defendant City of New York (the "City") downzoned the area in which plaintiff's parcel was located, rendering his proposed structure too large to be built. Plaintiff claims that defendants' actions amounted to a taking of his property without just compensation, in violation of his rights under the Fifth and Fourteenth Amendments. He has named as defendants the City, the New York City Planning Commission ("CPC"), and the New York City Department of City Planning ("DCP") (referred to collectively herein as the "City"), as well as the New York City Transit Authority ("MTA") (referred to collectively herein as "Transit Defendants").

"Traditionally, the doctrine of *res judicata*, or claim preclusion, provides that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.' " *Burgos v. Hopkins*, 14 F.3d 787, 789 (2d Cir. 1994) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Plaintiff's claims alleging a violation of his substantive and procedural due process rights, as well as his equal protection rights, were dismissed by Judge Ward in a scholarly and very detailed opinion in 1991. *See Sudarsky v. City of New York et al.*, 779 F. Supp. 287 (S.D.N.Y. 1991), *aff'd*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1064, *reh'g denied*, 507 U.S. 980 (1993).

Plaintiff now seizes upon Judge Ward's determination that his regulatory takings claim was not ripe, *see id.* at 301 ("Plaintiffs did not make use of the state court system in order to obtain compensation for their alleged taking, and thus their takings claim is unripe for this rea-

son as well."), to support his theory that this Court left open the possibility that he could return to this Court and relitigate this particular issue, if he was unsuccessful, in state court.

Preliminarily, it should be noted that plaintiff's allegations in the Complaint that there was something unlawful about defendants' insistence that an easement be given as a condition to the development of his parcel, (*See* Compl. pp. 7 & 9.), were explicitly addressed and rejected by Judge Ward. *See Sudarsky*, 779 F. Supp. at 298-301. Judge Ward found that the defendants had established the reasonableness of requiring an easement for subway access in order to offset the increase in pedestrian traffic that might be associated with plaintiff's development. *See id.*

As to the regulatory takings claim—the aspect of plaintiff's takings claim that was held to be unripe—plaintiff misperceived this Court's ruling. As this Court has already ruled, in order to maintain a claim for a regulatory taking of property, a plaintiff must establish that he was denied economically viable use of his property by virtue of the regulation at issue; and in order to establish that he was so deprived, a plaintiff must first obtain "a final authoritative determination of the type and intensity of development legally permitted on the subject property." *See id.* at 300.

It is here that plaintiff ignores the crucial holding of this Court in its 1991 decision that Sudarsky "was required to obtain a conclusive determination as to what type of development would be allowed on [his] property . . . . Plaintiffs made no such effort, and may not now pursue a regulatory takings claim in federal court." *Id.* at 300-01.

This holding precludes plaintiff's new Complaint. As this Court noted in 1991, plaintiff opted to sell off all of

the property in question within a year after the City downzoned the area. Indeed, he sold the property for $12 million, *see id.* at 293, approximately the same price at which he purchased it, which at the very least, establishes that the property was at least no less economically viable than when he bought it. More importantly, however, plaintiff sold the property rather than obtain from the appropriate agencies a determination as to its maximum economic use.

Subsequent to the dismissal of his federal lawsuit, plaintiff brought suit in state court on claims arising under the same facts and circumstances as those presented in federal court. The state courts dismissed plaintiff's claims as well.

It is well settled that, pursuant to the Constitution's Full Faith and Credit Clause, "a federal court must give to a state court judgement the same preclusive effect as would be given that judgement under the law of the State in which the judgement was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see also Burgos v. Hopkins*, 14 F.3d at 789.

That plaintiff presented his regulatory takings claim in state court is manifest both in his state court pleadings and in his various briefs and memoranda presented throughout the history of the state court proceedings. For example, after laying out factual allegations that closely track the allegations in this Complaint, plaintiff claimed—as he does now—that the transit easement was used to deprive him of his right to develop his property according to the plans he submitted, and that defendants' actions in this regard constituted a *de facto* taking in violation of his constitutional rights. (*See* Plaintiff's February 17, 1993 Amended Complaint at ¶¶ 73, 84.) While plaintiff limited his pleading to claims arising under the New York State Constitution, he nonetheless frequently

raised arguments in state court predicated upon federal law

In granting defendant's summary judgement motion, New York state courts rejected plaintiff's constitutional claims. Indeed, both the Appellate Division, First Department, as well as the Court of Appeals, affirmatively acknowledged that plaintiff had presented constitutional claims and expressly rejected them.

The Appellate Division, First Department held that, "for the reasons stated by the Federal court in dismissing plaintiff's prior federal action, the challenged governmental action does not fall below a floor of constitutional protection for property owners." *Sudarsky v. City of New York*, 247 A.D.2d 206 (1st Dept.) (quotation marks and citations omitted), *app. dismissed*, 92 N.Y.2d 845, *lv. to app. denied*, 92 N.Y.2d 815 (1998), *rearg. denied*, 93 N.Y.2d 849, *rearg. dismissed*, 93 N.Y.2d 1042, *cert. denied*, 120 S. Ct. 49 (1999).

Plaintiff may not avoid the application of *res judicata* by asserting that he withheld his federal claims from the state court proceeding. As set forth above, plaintiff did in fact raise his federal claims in state court.

Further, where plaintiff's federal "takings" claim is considered unripe, and the litigant seeks instead to vindicate his rights in state court, the final state court judgement precludes subsequent litigation on that claim in federal court. *See Palomar Mobilehome Park Assoc. v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3rd Cir. 1989).

Defendants' motion pursuant to Rule 12(b)(1) and 12(b)(6) for an order granting summary judgment is *granted*. The Clerk of the Court is directed to enter judgment in favor of the defendant and close the case.

SO ORDERED:

BARBARA S. JONES
BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

DATED: New York, New York
October 20, 2000

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

00-9470
Filed March 12, 2002

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of March two thousand two.

Present:

Hon. Rosemary S. Pooler
Hon. Robert A. Katzmann
CIRCUIT JUDGES,

Hon. David N. Hurd*
DISTRICT JUDGE.

---

* The Honorable David N. Hurd of the United States District Court for the Northern District of New York, sitting by designation.

PETER SUDARSKY and NOMINEE TRADING CORPORATION, d/b/a 225-227 East 52nd Street Associates,

Plaintiffs,

PETER SUDARSKY,

Plaintiff-Appellant,

—v.—

THE CITY OF NEW YORK, et al.,

Defendants-Appellees.

A petition for panel rehearing having been filed herein by Peter Sudarsky

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk

By: ARTHUR M. HELLER
Arthur M. Heller
Administrative Attorney

Appendix D

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

PETER SUDARSKY ET AL., APPELLANTS,

M. Berger

—v.—

THE CITY OF NEW YORK ET AL., RESPONDENTS

L. Jaeger

MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR
LEAVE TO FILE LATE NOTICE OF CLAIM

DECIDED: OCT 31, 1995 ENTERED: OCT. 31, 1995

HON: Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

OPINION: Order, Supreme Court, New York County (Salvador Collazo, J.), entered April 14, 1994, granting defendants' motion for summary judgment dismissing the complaint on the grounds of res judicata and collateral estoppel, and denying plaintiffs' cross-motion to file

a late notice of claim or to deem prior filings to constitute a notice of claim pursuant to General Municipal Law § 50-e, unanimously reversed, on the law, defendants' motion denied, the complaint reinstated and the matter remanded for further proceedings, without costs.

The plaintiffs assembled eight contiguous buildings on East 52nd Street and East 53rd Streets in Manhattan for the purpose of constructing a 17-story residential building on the East 52nd Street site and renovating the three buildings on East 53rd Street. They contend that by reason of various actions or inactions, the defendants held up the proposed project until the area was downzoned, thus preventing the consummation of their plan and resulting in the sale of the parcel for $10 million, less than its fair market value before downzoning.

Plaintiffs initially sued in the United States District Court for the Southern District of New York, alleging constitutional claim and the defendants were granted summary judgment on plaintiffs' regulatory taking claim, basically on the ground that the matter was not ripe for adjudication inasmuch as there had not been a final determination by the local administrative agencies with respect to the issues and plaintiffs had not made use of the State court system in order to obtain compensation for the alleged taking, and dismissed plaintiffs' pendent State claims under the abstention doctrine (Sudarsky v City of New York, 779 F Supp 287, affd 969 F 2d 1041, cert denied 506 US 1084, reh denied 507 US 980, motion to vacate denied 1992 US Dist LEXIS 16557 [SD NY, Oct. 28 1992, Ward, J.], reh denied 1993 US Dist LEXIS 53 [SD NY, Jan. 5, 1993, Ward, J.].

Under the circumstances, the Federal court's determination was not final and so could not be the ground for application of the doctrine of res judicata, although some aspects might have a collateral estoppel effect,

which question can only be determined when all of the contentions are considered in a trial of the issues.

The cross-motion by plaintiffs to file a late notice of claim or to deem prior filings to constitute a notice of claim was denied on the ground of mootness in view of the granting of summary judgment to the defendants on the ground of res judicata. Accordingly, upon remand the cross-motion should be considered anew.

Concur–Murphy, P.J., Rubin, Kupferman and Williams, J.J.

Appendix E

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT, NEW YORK

Feb. 3, 1998

PETER SUDARSKY, et al.,

Plaintiffs-Appellants,

—v.—

CITY OF NEW YORK et al.,

Defendants-Respondents.

Martin M. Berger, *for plaintiffs-appellants*.
Jane S. Earle and Ira J. Lipton, *for defendants-respondents*.

Order, Supreme Court, New York County (Norman Ryp, J.), entered February 19, 1997, which denied plaintiffs' motion for leave to file a late notice of claim and granted defendants' cross motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We decline to give the prior decision of this Court in this action (220 A.D.2d 353, 633 N.Y.S.2d 26) law of the case effect as to anything other than "legal determina-

tions that were necessarily resolved on the merits in the prior decision" (Baldasano v. Bank of New York, 199 A.D.2d 184, 605 N.Y.S.2d 293). As such, none of the parties' arguments on this appeal are foreclosed. Although we do not agree that the action was untimely commenced, since CPLR 203(b)(5)(i) was applicable to Supreme Court actions during the so-called transitional period (L.1992, ch. 216; see, Campbell v. Command Sec., 216 A.D.2d 508, 509, 628 N.Y.S.2d 775), we find that a notice of claim is required for the causes of action plaintiffs assert, and that adequate notice had not been given. We decline to grant plaintiffs leave to file a late notice in the present circumstances where there is no adequate reason for plaintiffs' "delay in taking steps to obtain permission to give late notice" (Matter of Rios v. City of New York, 180 A.D.2d 801, 802, 580 N.Y.S.2d 438) and where plaintiffs' action is without substantive merit. For the reasons stated by the Federal court in dismissing plaintiffs' prior action (see, Sudarsky v. City of New York, 779 F.Supp. 287, affd. 969 F.2d 1041, cert. denied 506 U.S. 1084, 113 S.Ct. 1059, 122 L.Ed.2d 365, rehg. denied 507 U.S. 980, 113 S.Ct. 1437, 122 L.Ed.2d 803), the challenged governmental action does not fall below a "floor of constitutional protection for property owners" (Manocherian v. Lenox Hill Hosp., 84 N.Y.2d 385, 392, 618 N.Y.S.2d 857, 643 N.E.2d 479, cert. denied 514 U.S. 1109, 115 S.Ct. 1961, 1962, 131 L.Ed.2d 853).

MILONAS, J.P., and RUBIN, TOM and MAZZARELLI, JJ., concur.

Appendix F

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

INDEX NO. 29446/92—PART 22

PETER SUDARSKY, ET ANO

—v.—

THE CITY OF NEW YORK, ET AL

MOTION FOR SUMMARY JUDGMENT
AND CROSS-MOTION FOR
LEAVE TO FILE LATE NOTICE OF CLAIM

ENTERED APRIL 14, 1994
COUNTY CLERK'S OFFICE NEW YORK

Upon the foregoing papers it is ordered that this motion by defendants for an order pursuant to CPSR para. 3212, seeking summary judgment is granted. Plaintiff's cross-motion for an order seeking leave to file a late notice of claim is denied.

From a reading of the papers it appears that the allegations submitted by the plaintiffs, in opposition to the

summary judgment motion in this action, are similar to those submitted by plaintiffs for this same action in federal court. In granting defendants summary judgment in the federal action, the Honorable Robert J. Ward determined that the factual allegations made by plaintiffs in opposition to defendants' motion did not raise any material issue of fact necessitating a trial and that defendants were entitled to judgment as a matter of law. *Sudarsky v. City of New York*, 779 F. Supp 287 (S.D.N.Y. 1991). Therefore, the doctrines of collateral estoppel and res judicata prevent plaintiffs from relitigating the same issues of the same case.

As a result of the decision above, plaintiffs' cross-motion for leave to file late notice of claim is preempted, making the issue, a moot point. Further, plaintiffs have already picked their forum and their case has already been decided. Thus, no notice of claim is required.

dated 3/22/94 Salvador Collazos

Appendix G

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

The Hon. NORMAN RYP — Part 99

Index no. 29446-92

Motion Sec. no. 09

CROSS-MOTION

Plaintiffs' motion to file a late notice of claim and defendants' CPCR 3211 cross-motions to dismiss are consolidated for determination.

This action originated in the United States District Court, Southern District of New York, where the Hon Robert J. Ward dismissed all federal claims on Dec. 6, 1991. This dismissal was affirmed by the United States Court of Appeals for the Second Circuit on May 8, 1992. Plaintiffs then commenced the herein action on Dec. 24, 1992. Defendants now cross-move to dismiss as time barred. Where an action is dismissed by a federal court on non-meritorious grounds (or procedural grounds-federal issues notice?) as herein, the plaintiff has six months to recommence the action in State Court (CPLR 205(a)) In this instance the action was dismissed on Dec. 6, 1991, said dismissal was affirmed by The U.S. Court of Appeals, 2nd Cir., on May 8, 1992. However, plaintiffs did not recommence this action until December 24, 1992, more than one (1) year after the original dismissal and seven (7) and one half months after the

affirmance of said dismissal. Accordingly, the Summons and Complaint is dismissed. Plaintiffs application to file a late notice of claim is denied as moot.

so ordered.

NORMAN RYP

Entered: Feb. 19, 1997

(2)

No. 01-1539

Supreme Court, U.S.
FILED

MAY 8 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

—v.—

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

No. 01-1539

PETER SUDARSKY,

Petitioner,

—v.—

THE CITY OF NEW YORK, THE NEW YORK CITY PLANNING COMMISSION, THE NEW YORK CITY DEPARTMENT OF CITY PLANNING, THE NEW YORK CITY TRANSIT AUTHORITY, and THE METROPOLITAN TRANSIT AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF

THIS COURT'S INTERVENING DECISION RESTORES DISCRETION AND RELIEVES COURTS BELOW FROM A REQUIREMENT, REAL OR IMAGINED, TO REJECT TAKING CASES ON PROCEDURAL GROUNDS

The direct impact of The Court's finding in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* on the standing of *Sudarsky v. City of New York* is found on page 33, where The Court holds that

> In rejecting petitioners' *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other. . . . The outcome instead 'depends largely "upon the particular circumstances (in that) case' " citing *Penn Central*, [438 U.S.] at 124 (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958).

This finding frees courts below from being forced into arbitrary awards where nuisance and public interest concerns are mitigating factors in regulatory takings claims. Those courts no longer need to feel "under the gun" of "categorical rules" which deny discretion to consider, for example, the balance between harm to an owner v. benefit to the community. *Tahoe-Sierra* may relieve courts below from a requirement, real or imagined, to reject regulatory takings cases on unreal or procedural grounds of ripeness and *res judicata* as occurred in pendant case.

On grounds of "fairness and justice," reiterated in *Tahoe-Sierra*, Plaintiff's Petition should be granted. After 12 years of motion practice, trial of the merits is appropriate in this case.

TAHOE-SIERRA PROVIDES FOR AN INDIVIDUALIZED EXAMINATION OF THE CIRCUMSTANCES OF A TAKING CLAIM ON A CASE BY CASE BASIS

Cities use moratoria all the time to "maintain the status quo pending study and governmental decision making," as This Court noted on p. 12 of its decision, citing Williams v. Central, 907 P. 2d 701,706 (Colo. App. 1995).

The Court makes clear that its evaluation of a regulatory takings claim "entails complex factual assessments of the purposes and economic effects of government actions."

> The answer to the abstract question of whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case.
>
> Our regulatory takings jurisprudence . . . is characterized by "essentially ad hoc, factual inquiries," Penn Central, 438 U.S., at 124, designed to allow "careful examination and weighing of all the relevant circumstances." Palazzolo, 533 U.S., at 636 (O'Connor, J., concurring, p. 18).

This case gives The Court the opportunity to do exactly what its *Tahoe-Sierra* decision holds appropriate—that is to provide for an individualized examination of the circumstances as applied to a particular parcel on a case by case basis. The Court in its *Tahoe-Sierra* decision sets forth some of those particular circumstances which it may choose to examine whenever the government imposes . . . a moratorium on development: i.e.

> "investment backed expectations, the actual impact of the regulation on any individual, the importance

> of the public interest served by the regulation, or the reasons for imposing the temporary restriction." Id. p.16.

The Court also refers to the clear and undisputed relationship between the restrictions imposed by the regulatory agency and the results that the agency sought to achieve.

In pendant case, not one of these factors was litigated or examined by The Court below. For example, The Court Below failed to rule on the failure of The City to "substantially advance a legitimate state interest" noted on pg. 30 of the *Tahoe* decision with reference to *Agins* and *Monterey*. The City's easement demand provided for a tunnel which could not be built even if the easement was obtained.

A tunnel which cannot be built can hardly contribute to a reduction of problems of pedestrian circulation caused by the "general increase in the population" which defendants suggested would result from Plaintiff's planned 149 unit apartment house replacing 50 units in existing brownstones scheduled for demolition.

The Court below held my regulatory takings claim was not ripe for trial on two grounds: 1) I had failed to apply for a variance; 2) I had not obtained a "final determination" of permitted use of the property, and because I sold the property, I can never do so. The Court did not examine the futility of either action. A variance application was not available under provisions of the New York City Zoning resolution, and efforts to obtain a final determination were made futile by the imposition of a prerequisite for dedication of an easement which Defendants had made impossible to dedicate.

Rather than identifying and adjudicating the issues of the case, The Court below followed the practice in the

Circuits of barring a regulatory takings claim from the federal courts on feeble and mistaken grounds of ripeness, holding that Plaintiff had not obtained a "final determination" of the permitted use of his eight contiguous properties in midtown Manhattan. The Court below reached its finding without reference to the futility of Plaintiff's efforts to obtain that determination. The regulation imposed by defendants in this case barred not only issuance of a permit on plaintiff's vacant property but also any efforts Plaintiff made or could have made to regain use of his property and ripen his claim.

On the basis of its finding of lack of ripeness and its additional finding that Plaintiff's claim can never become ripe because he sold the property before obtaining that final determination of permitted use, The Court below then granted Defendants' Rule 12(b)(6) motion to dismiss in its unpublished decision, although no prior court ever permitted trial of the merits in this case or adjudicated the issues of fact which require resolution for any decision on the merits.

SUDARSKY V. CITY OF NEW YORK PRESENTS THE SAME ISSUE WHICH THIS COURT ADDRESSES IN *TAHOE-SIERRA*

Whether a moratorium on development constitutes a regulatory taking of property requiring compensation under the Takings Clause is the question raised by Plaintiff in his suit.

A ban on issuance of a permit necessary to make any use of Plaintiff's vacant property was imposed for the purpose of facilitating Plaintiff's dedication of an easement under the property. Defendants said they required the easement to make possible future construction of a tunnel to connect two subway stations. The permit moratorium continued for 23 months during a process of

negotiation of terms of the easement. The futility of further efforts to dedicate the easement became clear when Defendant City of New York acknowledged that a tunnel had not been designed and refused to provide dimensions of an easement which they would also agree to accept.

IT IS NOT NECESSARY FOR THE COURT TO DECIDE WHETHER PLAINTIFF'S CLAIM FALLS UNDER *LUCAS* OR *PENN CENTRAL*

A trial of the merits will determine whether there was a taking of all use and whether that taking was made permanent by the City's dilatory actions and refusal to grant a permit necessary for the owner to make use of his property or to obtain a "final determination" of its permitted use.

Although the decision of This Court holding that a decision in a regulatory takings claim is fact specific, The Court Below failed to examine the facts. Whether the temporary regulation which barred all use of the property was made permanent by the dilatory, deliberate actions of the municipality is a question of fact. A court or a jury can decide the question. It cannot be answered without a trial.

WHETHER A PERMANENT OR TEMPORARY REGULATORY TAKING CLAIM REQUIRES COMPENSATION IS A SUBJECT FOR TRIAL

The *Tahoe-Sierra* decision of The Court notes that, "Logically a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted (p.28, Cf. Agins v. City of Tiburon, 447, U.S., at 263, n.9).

> A permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole,"

> whereas a temporary restriction that merely causes a diminution in value is not.

But even this observation of The Court is fact sensitive and falls under the Court's requirement for evaluation of the "particular circumstances" of the case.

In *Sudarsky*, Defendants "certified" a need for an easement which The City could not use if it was obtained for the purpose of delaying Plaintiff's use of the property in an effort to preserve brownstones at the sole expense of their owner. Two years after their first interference with Plaintiff's ability to obtain a permit and commence construction, Defendants refused to provide dimensions of an easement they would agree to accept. Dedication of the easement was a barrier to a permit. No sign existed that Defendants would ever lift their easement barrier while Plaintiff owned the property. Whether the taking was temporal or permanent may be a question for a court or jury to decide, but the existence of the question does not justify a Court's grant of a res judicata motion dismissing the claim.

The opinion of This Court in *Tahoe-Sierra* holds that

> The ultimate constitutional question is whether the concepts of "fairness and justice" that underlie the Takings Clause will be better served by . . . categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases.

Whichever rule applies, the Court upholds Justice O'Connor in her concurring opinion in Palazzolo:

> The better approach to claims that a regulation has effected a temporary taking "requires careful examination and weighing of all the relevant circumstances."

The requirement for fairness and justice in a Fifth Amendment Takings Clause case is not served by dismissal on grounds that a plaintiff failed to take a futile or unavailable action.

Plaintiff's claim for costs which accrued during the period of time defendants barred plaintiff from any use he could make of his property stands uncontested. Yet that claim was not reached by The Court below. The Court simply overlooked it, deciding, apparently, that a claim for costs exceeding $3,000,000 while all use of property was barred is too insignificant for a Federal Court to trouble itself with as long as a ripeness barrier may exist to plaintiff's claim for a permanent regulatory taking and the temporary claim is temporal.

The Decision in Tahoe-Sierra rejects a "set formula" for determining when "justice and fairness" require compensation, but it does not suggest that a court should walk away from a decision based on a finding of ripeness when the very actions needed to achieve ripeness were barred by the actions of a municipality.

Defendants proudly acclaimed that they preserved the "light and air above the property for the health and welfare of future generations of New Yorkers." The problem is that they did so at the sole expense of Plaintiff-Appellant Peter Sudarsky.

Defendants managed a windfall. Plaintiff lost the earnings of an adult lifetime.

THIS PETITION DEALS WITH THE NATURE AND EXTENT OF A RIPENESS BAR TO LITIGATION OF REGULATORY TAKING CASES

Now that This Court's *Tahoe-Sierra* decision provides some flexibility to courts below in the adjudication of temporary takings claims, perhaps This Court should relax ripeness requirements, some of which may take years to achieve while an owner is required to meet costs of ownership which can make viable economic use of a property unlikely. A variance application, for example, may take years to resolve in most jurisdictions. In This Case, a variance application was prohibited by the applicable zoning laws.

Specifically, This Case raises the issue of whether a ripeness bar should extend to cases where an owner has had to sell before adjudication of a takings claim or before obtaining a "final determination" of permitted use of property. This Court's requirement for "Fairness and Justice" suggests that an owner not be barred from pursuing a takings claim when delay and dilatory tactics of a municipality have made futile efforts to obtain that "final determination" held by The Court below as necessary to cross the ripeness barrier.

CONCLUSION

The Petition should be granted, the judgment of The Court below vacated, and the case remanded for further procedings in the light of *Tahoe-Sierra v. Tahoe Regional Planning Association.*

Respectfully submitted

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May 2, 2002

MOTION FILED

MAY 17 2002

(3)

No. 01-1539

In the

Supreme Court of the United States

PETER SUDARSKY,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF SHEMCO, INC. IN SUPPORT OF PETITIONER

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Counsel for Amicus Curiae Shemco, Inc.

15 pg

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2(b), Shemco, Inc. respectfully seeks leave to file the attached brief amicus curiae in support of petitioner Peter Sudarsky. Counsel for respondent City of New York effectively withheld their consent by declining to return the undersigned's telephone calls.

As described more fully in the attached brief, Shemco is a commercial lighting equipment supplier based in New Haven, Connecticut; it supplies, along with commercial users, primarily real property developers. Shemco was prepared to supply petitioner with equipment for the aborted project that gave rise to this litigation. Shemco also believes that faulty applications of ripeness doctrine should not be permitted to insulate from review government actions that work regulatory takings.

Because petitioner has appeared pro se and respondents have waived the right to file briefs in opposition, the attached amicus brief brings to the attention of the Court relevant matter not already brought to its attention by the parties.

For these reasons, Shemco, Inc. respectfully requests the Court to grant leave to file the attached brief amicus curiae.

DATED: May, 2002.

Respectfully submitted,

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QUESTION PRESENTED

Whether a property owner is, regardless of the relevant facts and circumstances, categorically precluded on ripeness grounds from ever asserting a regulatory takings claim solely because he never "requested a variance" or "submitted a [new] proposal" for development.

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INTEREST OF AMICUS CURIAE

Amicus curiae Shemco, Inc. is a supplier of commercial lighting equipment based in New Haven, Connecticut. Along with commercial users, Shemco supplies primarily developers of real property. Shemco has a particular interest in this case, in that it was prepared to supply petitioner with equipment for the aborted project that gave rise to this multi-year regulatory takings litigation. Shemco also has a more general interest in this case: when government officials restrict the use and development of property in such a manner as to work a taking of private property for public use, and when the courts refuse to hear claims for such regulatory takings under faulty applications of doctrines like ripeness, all citizens suffer.[1]

SUMMARY OF ARGUMENT

Petitioner Peter Sudarsky has been attempting for a dozen years to convince some court, state or federal, to hear and decide the merits of his regulatory takings claim against the City of New York. In the latest rebuff, the Second Circuit held that his claim was not ripe under the categorical rule that a takings claim can never be ripe if a property owner does not *request a variance* or *submit a new proposal* after his first development proposal is rejected. This categorical rule brings the decision below into conflict with the many federal and state decisions that have excused property owners from these actions if they would be *idle or futile*, which is precisely what Mr. Sudarsky alleges. The Second Circuit's categorical rule also conflicts with the recent takings decisions of this Court, which eschew per se rules in favor of examining all relevant circumstances.

---

[1] Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

ARGUMENT

THE CATEGORICAL RIPENESS REQUIREMENTS IMPOSED BY THE SECOND CIRCUIT ARE IN CONFLICT WITH THE DECISIONS OF OTHER LOWER COURTS AND OF THIS COURT

A. The Lower Court's Ruling

Like many property owners in recent years, Mr. Sudarsky comes to this Court seeking to overturn a lower court's ruling that his regulatory takings claim is not ripe for decision. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997). In the present case, the Second Circuit went one better than the courts that were reversed in *Palazzolo* and *Suitum*: it ruled not merely that Mr. Sudarsky's regulatory takings claim was not ripe; it ruled that "[h]is claim *never* will be 'ripe.' " Petition Appendix (Pet. App.) 5a (emphasis added). Why such a definitive—indeed, final—holding?

The Second Circuit's answer was simple: "because [Mr. Sudarsky] sold his property before obtaining the required determination" of the subject property's permitted uses. *Id.* In theory, this statement could mean one of two things. First, that a person cannot succeed on a regulatory takings claim unless he owns the property at the time the reviewing court rules on his claim. That is a self-evidently wrong proposition, and it is contradicted by, among other decisions, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (rejecting argument that "because Del Monte sold the Dunes to the State of California for $ 800,000 more than it paid, economically viable uses for the property must have existed," and upholding takings award of $1.45 million), *aff'd*, 526 U.S. 687 (1999). *Cf.* Brief for the Petitioner at 3, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (No. 97-1235) (stating that "Del Monte Dunes had sold the property for $ 4.5 million ($ 800,000 more than its purchase price) while the case was pending"), 1997 U.S. Briefs LEXIS 1235 (June 4, 1998).

Second, and much more likely, the Second Circuit meant to give significance to the fact that, having sold the property, Mr. Sudarsky could no longer invoke those talismans of ripeness jurisprudence, the "variance" and the "second proposal." That is, because he "never requested a variance from the new zoning requirements or submitted a proposal other than his 17-story apartment building," and because he "never will be able to do so" in the future, his takings claim could not be ripe.

Did the Second Circuit's demand that Mr. Sudarsky request a variance or submit a second development proposal as a condition of asserting a takings claim depend on the specific facts of his case? Absolutely not: given his failure to do one or both of these things, Mr. Sudarsky "can under *no set of facts* satisfy" ripeness requirements. Pet. App. 4a (emphasis added) (citing *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986)). In other words, according to the Second Circuit, it is a categorical prerequisite to advancing a regulatory takings claim that a property owner whose first development proposal is rejected either *request a variance* or *submit a new proposal*. As explained below, this categorical proposition of ripeness law cannot be reconciled with the decisions of other lower courts or with the decisions of this Court.[2]

B. The Conflict with Other Lower Courts

Many lower courts have rejected the notion that requesting a variance or submitting multiple development proposals is a categorical prerequisite to ripening a takings claim. Usually this rejection goes under the name of the "futility exception" to the final decision requirement.

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[2] At the beginning of its opinion, the Second Circuit noted that the district court had dismissed Mr. Sudarsky's complaint "principally on grounds of *res judicata*." Pet. App. 3a. As described in the text, however, the Second Circuit's ruling obviously did not rest on those grounds. Accordingly, res judicata does not, and in fact should not, bar the Court's consideration of the question presented.

The Ninth Circuit, for example, has opined that the exception serves "to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 504 (1990), *cert. denied*, 502 U.S. 943 (1991). Moreover, a "variance" or similar procedural devices need be sought only when they "are available and *could* provide [some] relief." *Id.* at 503 (emphasis added). In general, "the final decision requirement can be avoided if attempts to comply with that requirement would be futile." *Hoehne v. County of San Benito*, 870 F.2d 529, 534 (9th Cir. 1989). As the court of appeals put the point in an earlier iteration of the *Del Monte Dunes* litigation:

> This circuit recognizes a limited futility exception to the requirement that a landowner obtain a final decision regarding the application of land use regulations to the affected property. Under this exception, the resubmission of a development plan or the application for a variance from prohibitive regulations may be excused if those actions would be idle or futile.

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1501 (9th Cir. 1990).

The California courts have adopted this same analysis as their own. As the state court of appeal observed in *Calprop Corp. v. City of San Diego*, 91 Cal. Rptr. 2d 792, 800 (2000), "[t]he futility exception as articulated in California cases has largely followed the pattern described by the Ninth Circuit in *Del Monte I*." *See also id.* at 799 (quoting with approval the block-quoted passage above); *Toigo v. Town of Ross*, 82 Cal. Rptr. 2d 649, 660 (1998) ("Under [the futility] exception, the submission of another development plan is excused if such an application would be an 'idle and futile act.'").

Other federal courts of appeals are in accord with the decisions of the Ninth Circuit and in conflict with the decision below. The Federal Circuit, which handles most of the takings claims asserted against the United States, has opined that "the futility exception may sometimes excuse a property owner from submitting 'multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved.' " *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001) (quoting *Howard W. Heck & Associates v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998)). The Sixth Circuit has held that the exception, "stated in the context of allegations of 'takings' of property without just compensation as proscribed by the Fifth Amendment, applies where to seek a variance from a zoning regulation would be an 'idle and futile act.' " *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1363 (6th Cir. 1992); *accord, e.g., Seguin v. Sterling Heights*, 968 F.2d 584, 588 (6th Cir. 1992) (opining that "if a plaintiff can demonstrate futility, he or she will be excused from complying with the variance requirement"). Other appellate courts are in accord.[3]

The ruling of the court below cannot be reconciled with these decisions. As noted by the Second Circuit, "[d]uring the planning process, city officials informed [Mr.] Sudarsky that they required a transit easement on his property for an underground pedestrian tunnel." Pet. App. 3a. If, as Mr. Sudarsky

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[3] *See Eide v. Sarasota County*, 908 F.2d 716, 726 (11th Cir. 1990) ("The so-called 'futility exception' to the final decision requirement for due process takings and just compensation claims does excuse the repeated submission of development plans where the submission would be futile."), *cert. denied*, 498 U.S. 1120 (1991); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir.) (agreeing with the Ninth Circuit that "the final decision requirement may be met with proof that attempts to comply would be futile"), *cert. denied*, 488 U.S. 891 (1988); *Sammon v. New Jersey Board of Medical Examiners*, 66 F.3d 639, 643 (3d Cir. 1995) (opining that "[l]itigants are not required to make such futile gestures to establish ripeness").

alleges, these same officials imposed a "permit ban" until the required easement was furnished, and if, as he further alleges, the easement could not possibly be furnished because the "City had not designed [the] tunnel and had failed to determine the dimensions of an easement which it was willing to accept," *id.*, then this is a classic case of futility. Is it not "idle and futile" to submit a second application for a building permit when the first was rejected not because the project was too big but rather because the applicant had not yet provided an easement that in fact was impossible to provide? Is it not "idle and futile" to request a variance from a transit easement requirement when the decision makers had *already* reconsidered their decision? *See Sudarsky v. City of New York*, 779 F. Supp. 287, 292 (S.D.N.Y. 1991) ("This letter was superseded by a second letter from the [New York City Transit Authority], dated February 13, 1987, which stated: 'upon reconsideration, the Transit Authority has determined that a transit easement is required [on Sudarsky's proposed development].'"), *aff'd mem.*, 969 F.2d 1041 (2d Cir. 1992), *cert. denied*, 506 U.S. 1084 (1993).[4]

C. The Conflict with this Court

Although the Second Circuit purported to base its categorical ripeness ruling on this Court's decision in *MacDonald*, that case does not support the court below. In explicating the requirement that a property owner obtain a final and authoritative determination of legally permitted uses, *MacDonald* was careful to state that a "property owner is of course not required

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[4] The Ninth Circuit's decision in *Hoehne* provides an explicit contrast with the decision below in this regard. *See* 870 F.2d at 535 ("It would have also been futile for the Hoehnes to seek a conditional use permit or a more favorable rezoning because in actually rezoning the tract to further restrict development, the supervisors themselves sent a clear and, we believe, final signal announcing their views as to the acceptable use of the property."). Here, Transit Authority officials sent a similarly "clear" signal when they decided, upon reconsideration, to impose the easement requirement on Mr. Sudarsky.

to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination." 477 U.S. at 350 n.7. As described above, the Catch-22 in which Mr. Sudarsky landed —required to provide a transit easement to officials who had not determined what dimension of easement they would accept —surely must be an example of the kind of unfair procedures *MacDonald* meant to condemn.

More fundamentally, the Court's most recent takings decisions condemn the kind arid formalism the Second Circuit's categorical must-request-variance-or-submit-new-proposal rule would impose on takings law. In the *Palazzolo* litigation, the state court found the property owner's regulatory takings claim unripe based on the "self-evident conclusion"—a conclusion remarkably similar to the Second Circuit's—that "a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." *Palazzolo v. State*, 746 A.2d 707, 714 n.6 (R.I. 2000). This Court categorically rejected that categorical formulation: "Ripeness doctrine does not require a landowner to submit applications for their own sake." 533 U.S. at 622. The relevant inquiry is not whether the property owner has complied with some formalistic requirement; instead, it is whether there is, under the particular facts and the governing state and local law, "uncertainty as to the land's permitted use." *Id.* By contrast, if an examination of the facts and law "makes clear the extent of development permitted," that is sufficient. *Id.* at 625-26.

The Court's decision just last month in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, No. 00-1167, 2002 U.S. LEXIS 3028 (Apr. 23, 2002), confirms these points. Though *Tahoe-Sierra* was not strictly a ripeness case, its general analytical framework has great bearing here. If the Court was correct to "resist the temptation to adopt per se rules in our cases involving partial regulatory takings," *id.* at

*43-44, it surely would not countenance per se rules like that established by the court below. If the answer to questions of substantive takings law "depends upon the particular circumstances of the case," *id.* at *35, then so also ought the answer to questions of ripeness. If the Court's regulatory takings jurisprudence truly "is characterized by essentially ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances," *id.* at *36 (internal quotation marks omitted), the aspect of regulatory takings jurisprudence that is the ripeness doctrine should share in such characterization. The Second Circuit's categorical rule surely does not.

Given the lower court's conflict with a decision handed down by this Court only last month, the Court should at least consider granting Mr. Sudarsky's petition, vacating the decision below, and remanding the case for reconsideration in light of *Tahoe-Sierra*. After more than a dozen years of litigation in which no court has ever addressed the merits of his regulatory takings claims, Mr. Sudarsky deserves no less.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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